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ABSTRACT

This booklet discusses due process for institutions of higher education and how principles of due process should shape the design of institutional procedures for resolution of conflicts affecting students, faculty, academic programs, and research. The booklet defines and explains various area of conflict, the role of due process, and key legal decisions that have established accepted practice or have recently changed traditional practice. Section I is an introduction. Section II defines and explains due process as an important legal concept which should be incorporated into institutional procedures for situations that may not ever be brought to court. Section III discusses the evaluation of student academic performance. Section IV covers student misconduct related and unrelated to academic performance. Section V covers difficult or troubled students. Section VI looks at admissions fraud. Section VII handles firing or discipline of faculty or other employees. Section VIII covers three special issues: scientific misconduct, sexual harassment, hate speech, and student record privacy. Section IX discusses liability for institutions and administration or staff. Section X is a conclusion and Section XI offers a checklist for minimizing academic legal problems. Contains 54 references. (JB)

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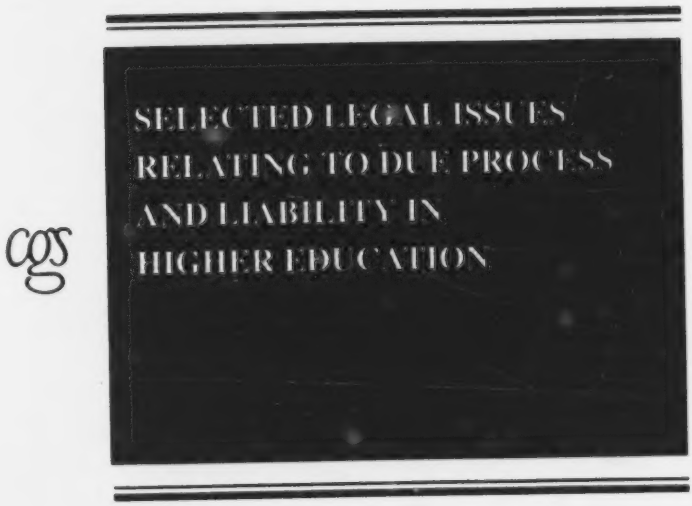

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SELECTED LEGAL ISSUES RELATING TO DUE PROCESS AND LIABILITY IN HIGHER EDUCATION

COUNCIL OF GRADUATE SCHOOLS

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FOREWORD

This booklet was written to provide faculty members and administrators with a basis for understanding some of the legal implications involved in the resolution of conflicts affecting students, faculty, academic programs, and research. The idea for a publication on this topic grew out of a series of workshops, held over the years at CGS meetings, on selected legal issues of interest to graduate deans. Among the issues of greatest interest were due process and liability concerns, particularly as they related to a broad spectrum of situations including academic misconduct, termination of employees, sexual harassment, privacy of student records, revocation of degrees, and plagiarism. It quickly became apparent, however, that the principles discussed and the examples given applied not just to graduate education, but to higher education in general. With that in mind, we offer this publication—not as a substitute for the extensive literature that exists on legal aspects of higher education, or as a primer for budding academic lawyers—but as a resource for facilitating discussion of these complex issues and for increasing the effectiveness of the interaction between academics and university attorneys.

We want to thank Elsa Kircher Cole, General Counsel at the University of Michigan, for writing this booklet for us. She has, for many years, presented this material at CGS workshops, and we are grateful, not just for her willingness to share her expertise with us, but also for her continuing interest in graduate education.

We also wish to thank Phillip M. Grier, President of the National Association of College and University Attorneys (NACUA), and Marc Mills, Director of the Legal Reference Service of that organization, for their interest, advice, and counsel during the preparation of this booklet.

Finally, we wish to thank TIAA-CREF for the generous support they have provided to assist in the publication of this booklet.

I. INTRODUCTION

Individuals charged with the administration and operation of higher education share a responsibility for ensuring that the institution is fair and equitable in its treatment of everyone involved in the enterprise. At one level, this involves defining the conditions under which academic programs are carried out, and developing policies and procedures covering everything from admission to graduation, performance standards and expectations for faculty and students, and evaluation processes for assessing accomplishment at all levels. At another level, policies making clear the institution's commitment to the highest ethical and professional standards in teaching, research, and scholarship need to be articulated, and procedures established for dealing with situations where those standards are not met.

It is important that all policies and procedures be as clear and as unambiguous as possible and, in addition, be perceived as being not only fair, but consistent with the objectives of higher education. This is best done by developing them in a collegial manner that involves all those affected. Obviously, such policies and related matters must be written, must be public, and must be distributed to all faculty, students, administrators, and other personnel who participate in instruction and research.

At some point, challenges will arise to all of these conditions. Individuals may object to a policy itself, or to the way it has been implemented in their particular case. There may be conflicting views among those involved about what happened and how it should be interpreted. In addition, allegations of improper conduct may arise involving academic programs or research activities. In all of these cases, there must be processes defined before the fact for investigation of conflicting views and/or allegations of improprieties, and a setting provided in which conflicts and disputes concerning academic issues can be resolved.

While the processes we are describing must be general and broad in scope, certain kinds of problems arise with greater frequency than others, and university administrators and faculty members should be prepared to deal with them. These include:

- Academic and Research Misconduct
  - cheating
  - plagiarism
  - falsification or fabrication of data or experimental results

- Admissions and employment issues
  - credentials fraud

- Disputes involving differences of opinions
  - outcome of examinations,
    particularly, comprehensive
    examinations for the master's degree, and admission
    to candidacy and final defense of dissertation for the Ph.D.
  - ownership of data
  - degree requirements

- Specific issues
  - dismissal from the institution
  - revocation of degrees
  - sexual harassment

In most institutions, a multi-level system exists for dealing with such issues. For example, a student may seek assistance from his or her adviser in resolving a problem. If no satisfactory resolution is reached, the individual may choose to bring the issue to a departmental committee. The next stage might be a college grievance committee. All of these venues can be considered as "local" and most problems are best resolved at this level. Certainly, an individual should explore and exhaust these options before seeking an institutional level of resolution.

In some cases, however, the local level may be too close, with too many people directly involved in the case, so that questions of fairness or conflict of interest might be raised. If, for that reason or any other, resolution seems to be impossible at the local level, the next step is for the aggrieved party to take the complaint to some central office. In many institutions, for problems involving graduate programs, the graduate school provides a process for hearing and resolving cases of this kind. This is most often accomplished through committees made up of faculty members and, usually, graduate students, from departments or administrative units other than that of the individuals involved in the complaint. There may be additional procedures, involving other offices in the university—perhaps the Office of Academic Affairs—that deal with complaints or grievances on a university-wide basis, and across all degree levels. Whatever the particulars, the faculty and departmental administrators are responsible for making sure that the proper procedure, or sequence of procedures, is used. Bypassing or mishandling established procedures for resolving problems can cause many complications for all involved, ranging from unnecessarily embarrassing individuals to compromising the ability of the institution to make judgments based upon the substance of the issues.

None of the foregoing discussion has to do with legal proceedings. Instead, it represents a very general description of <u>institutional</u> procedures for investigating grievances or disputes, conducting hearings, and arriving at judgments. Universities, like many other organizations in society (particularly the professions, e.g., medicine, law) have insisted on preserving and protecting both their right and their responsibility to deal with their

own problems. The idea of a hearing by one's peers in matters involving professional conduct is firmly established, even though it may come under attack as, for example, in recent discussions of research misconduct and the ability of universities to effectively "police" themselves.

Although we have stated that institutions have a responsibility to deal with these issues as academic rather than legal problems, there is an overriding concept that forms the bedrock of all procedures of the kind we have described: the concept of due process.

In this booklet we will discuss due process—what it means and how it affects the design of institutional procedures. We also will discuss what happens when institutional procedures fail to produce a satisfactory outcome, and an aggrieved party seeks legal recourse. In both of these cases, a key individual is the institution's legal counsel, and it is particularly important for administrators—primarily deans and department chairs entrusted with the design and implementation of policies and procedures—to establish contact with this individual, preferably in a non-crisis situation, to discuss legal issues affecting education and research.

Jules B. LaPidus
President
Council of Graduate Schools
1994

II. DUE PROCESS IN THE HIGHER EDUCATION SETTING

A college or university administrator makes many decisions affecting students and faculty. At a public institution some of those decisions may affect rights that the courts have identified as protected by the "due process" of law. Administrators at private institutions may also find their decisions affected by the need for due process through handbook and policy statements that say that due process will be observed by the institution. An understanding of the concept of "due process" is therefore a logical place to begin a discussion of the legal requirements that affect the actions and decisions of today's academic administrator.

The Fourteenth Amendment to the U.S. Constitution provides that no state shall deprive any person of life, liberty or property without "due process of law." Public institutions, as state entities, are bound to observe due process in any decision regarding a student or faculty member that affects a "liberty" or "property" right.

Since the early 1960's courts have debated what decisions in academia implicate liberty or property rights. Courts generally recognize that a person's interest in his or her reputation, when connected with a tangible interest such as employment or ability to continue pursing a particular academic field, is a liberty interest.[1]

Courts have found property interests created by implied and express contracts between a student and the institution. For example, the United States Supreme Court has assumed that a student at a public college or university has a Fourteenth Amendment property interest in attending a college or continuing his or her education there.[2]

However, students probably do not have a property interest in admission to college. At least one court has held that admission to a professional school is a privilege and not a constitutional or property right.[3]

Faculty members can also have property rights through implied or express contracts with an institution. For example, a faculty member who has been granted tenure (even by default) has a protected property interest in continued employment.[4] A nontenured academic employee with a contract of employment for a specified term also has a protected property interest in that employment for the duration of the contract.[5]

[1]Paul v Davis, 424 US 693, 96 S Ct 1155 (1975), reh'g denied, 425 US 985, 96 S Ct 2194 (1976); Greenhill v Bailey, 519 F2d 5 (8th Cir 1975).

[2]Other cases finding such interest in attending a college or continuing education are Picozzi v Sandalow, 623 F Supp 1571 (ED Mich 1986), aff'd, 827 F2d 770 (6th Cir 1987), cert denied, 484 US 1044, 108 S Ct 777 (1988); Jaksa v Regents of the Univ of Michigan, 597 F Supp 1245 (ED Mich 1984), aff'd, 787 F2d 590 (6th Cir 1986); Hart v Ferris State College, 557 F Supp 1379 (WD Mich 1983); Martin v Helstad, 578 F Supp 1473 (WD Wis 1983); Univ of Houston v Sabeti, 676 SW2d 685 (1984); Ross v Pennsylvania State Univ, 445 F Supp 147 (MD Pa 1978).

[3]Phelps v Washburn Univ of Topeka, 634 F Supp 556 (D Kan 1986). See also Fleming v Adams, 377 F2d 975 (10th Cir 1967), cert. denied, 389 US 898 (1967).

[4]Bd of Regents of State Colleges v Roth, 408 US 564, 92 S Ct 2701 (1972).

[5]Perry v Sinderman, 408 US 593, 92 S Ct 2694 (1972).

Because an individual's liberty and property interests can be impacted by a public college or university's decision, the institution must provide some "due process" protections before affecting the interest. Since the early 1960's, courts had to decide what that due process must be. In their decisions, courts recognize that due process is a flexible concept and the amount of procedural protections that must be accorded a student or faculty varies with the circumstances.

The key to deciding the appropriate amount of due process is whether the decision-making process and procedures used to make that decision are fundamentally fair. A court generally weighs the following factors to decide if a certain element of traditional due process is required in a college or university proceeding:

1) The student's or faculty member's interest affected by the public institution's action.
2) The risk of an erroneous deprivation of that interest.
3) The public interest, weighed against the fiscal and administrative burden on the institution of any additional procedural requirements.[6]

The following sections will describe the common situations involving liberty and property interests that an academic administrator may face and the requirements the courts have imposed in such situations. Besides the due process required by the Fourteenth Amendment to the U.S. Constitution, other strictures on academic administrators will be described: 1) the requirements of certain federal and state laws; and, 2) the principles of contract law that apply to student/institution and faculty/institution relationships; e.g., the need for the institution to follow its own rules and regulations regarding students and faculty.

III. EVALUATION OF ACADEMIC PERFORMANCE

Some decisions by higher education administrators or faculty rest on the exercise of their academic expertise. The evaluation of a student's progress towards a degree, a faculty member's qualifications for tenure, or a program's continued relevance to a department are all situations which require the exercise of academic judgement.

Courts generally acknowledge that academic evaluations are not readily adaptable to the procedural tools of judicial or administrative decision making. As such, courts have been reluctant to reverse academic assessments because they respect the subjective and valuative nature of these decisions. Courts therefore have held that there is no substantive due process right to have a judicial review of an academic decision.[7]

Just because decisions require academic expertise does not mean they are insulated from court scrutiny and review. Courts will interfere in such a decision if it can be shown that it was motivated by ill-will or bad faith unrelated to academic performance.

[6]Mathews v Eldridge, 424 US 319, 334–35 (1976).

[7]Regents of the University of Michigan v Ewing, 474 US 214, 106 SCt 507 (1985).

Courts will also reverse or send back for a new institutional hearing a decision that is arbitrary or capricious or that is based on illegal discrimination.[8]

The courts will not get involved in a student's request for a substantive reevaluation of the student's academic performance, whether at a public or a private educational institution. The controlling case on that issue is Regents of the University of Michigan v Ewing.[9]

The U.S. Supreme Court in Ewing refused to review a state university's determination that a student was not academically qualified to continue in medical school. The court said:

> "When judges are asked to review the substance of a genuinely academic decision ... they should show great respect for the faculty's professional judgement. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not exercise professional judgment."[10]

A similar decision was reached in a case involving a private law school.[11] A law student challenged her dismissal from the school for poor grades, claiming the grade given for an exam was not a rational exercise of discretion by the professor. The trial court dismissed the claim, but the appellate court reversed. However, the state's highest court reversed the appellate court saying,

> "As a general rule, judicial review of grading disputes would inappropriately involve the courts in the very core of academic and educational decision-making. Moreover, to so involve the courts in assessing the propriety of particular grades would promote litigation by countless unsuccessful students and thus undermine the credibility of the academic determinations of educational institutions. We conclude, therefore, that, in the absence of demonstrated bad faith, arbitrariness, capriciousness, irrationality or a constitutional or statutory violation, a student's challenge to a particular grade or other academic determination relating to a genuine substantive evaluation of the student's academic capabilities, is beyond the scope of judicial review."

In another case, a nursing student challenged her receipt of a failing grade. The court refused to interfere, saying the student did not present any evidence from which it could be concluded that the giving of the grade was arbitrary or done in bad faith.[12] The college had presented proof that the student had acted in an unsafe and unprofessional manner and may have placed patients in danger.

[8] Hines v Rinker, 667 F 2d 699 (8th Cir 1981); Stevens v Hunt, 646 F2d 1168 (6th Cir 1981); Wilkenfield v Powell, 577 F Supp 579 (WD Texas 1983).

[9] Ewing, cited above, fn 7.

[10] Ewing, at 513, cited above, fn 7.

[11] Susan "M" v New York Law School, 556 NE 2d 1104 (NY 1988).

[12] Davis v Regis College, Inc, 830 P2d 1098 (Colo App 1991).

It is important to note that courts do occasionally find a university's academic evaluation to be arbitrary and capricious. For example, in one case, a college, for no discernible reason, required a student to participate in a course other than the one for which he had registered. The college gave the student an incomplete because he did not attend that course but instead attended his original class. When the college refused to grant the student a degree, the student sued to compel the award of the degree. The appellate court reviewing the matter ordered a trial on the issue as the college's action appeared arbitrary and capricious.[13]

Such a result can be avoided if (1) a public or private institution considers the totality of a student's performance before deciding to dismiss for academic failure and (2) the ultimate decision is made conscientiously with careful deliberation.[14]

Since the Ewing decision, courts have consistently required only a limited amount of notice before a public or private college or university takes action to discipline for poor academic performance, as opposed to discipline for misconduct. Courts continually say that they will interfere in academic misconduct cases only with the greatest reluctance.[15]

In a 1989 case, a university student received a series of poor evaluations before he was dismissed. The court held that those evaluations were sufficient notice of his academic problems and that it would not interfere with the university's decision to dismiss the student.[16] Likewise, in another case the court held that giving a nursing student three attempts to pass before dismissal was enough notice of academic problems.[17]

Further, it can be argued that those making an academic decision should be entitled to a presumption of honesty and integrity. That presumption should be overcome only if the student can prove the faculty member had actual bias, such as personal animosity, illegal prejudice, or a personal or financial stake in the outcome.[18]

Note: In some instances there may be an exception to the rule that only the limited due process described above is required in an academic evaluation decision. If the fact of the decision will be made known outside of the institution and the institution is a public one, a student arguably has a liberty interest involved. That liberty interest is created by the potential damage to the student's reputation and his or her loss of ability to continue his or her education in a particular field.

For example, in 1975 a federal court of appeal found the communication of a negative assessment of a student's intellectual ability by a medical school to a committee of the Association of American Medical Schools imposed a stigma on him.

[13]Shuffer v Bd of Trustees of the California State Universities and Colleges, 67 Cal App 3d 208, 136 Cal Rptr 527 (1977).

[14]Ewing, at 513, cited above, fn 7.

[15]Doherty v Southern College of Optometry, 862 F2d 570 (6th Cir 1988) cert denied, 493 US 810, 110 SCt 53 (1989); Mauriello v University of Medicine and Dentistry of New Jersey, 781 F2d 46 (3rd Cir 1986).

[16]Ross v University of Minnesota, 439 NW2d 28 (Minn App 1989).

[17]Clements v Nassau County, 835 F2d 1000 (2nd Cir 1987).

[18]Ikpeazu v Univ of Nebraska, 775 F2d 250 (8th Cir 1985).

That stigma deprived him of a liberty interest, the court held, as the Association would allegedly release the assessment to medical schools across the country. The court therefore required a hearing with notice to the student of his deficiencies and an opportunity to be heard before the academic decision was final.[19]

IV. STUDENT MISCONDUCT

A. UNRELATED TO ACADEMIC PERFORMANCE

When misconduct unrelated to academic performance occurs at a public or private institution, the institution has several options for dealing with the misconduct. It can use its own disciplinary procedures, it can encourage the victim to file a criminal complaint with the local prosecutor or to pursue a civil action against the student perpetrator, or it can use a combination of these approaches.[20]

Although there may be instances involving criminal behavior where the institution may prefer to defer any disciplinary action until the criminal process runs its course, generally institutions will want to deal internally with an incident of misconduct. This is because the institution has its own standards of conduct in the academic community that it wishes to enforce. Additionally, dealing with a matter internally gives the institution control over the proceedings, their timing, and the sanctions to be imposed: controls the institutions typically lack in either the civil or criminal courts.

As stated above, an institution's disciplinary action for misconduct, that affects the student's standing with the institution or results in termination of a benefit such as financial support, invokes a due process concern. The courts have established due process guidelines for administrators to follow that vary depending on the severity of the discipline proposed.

1. AT PUBLIC INSTITUTIONS

a) Dismissals

If a public college or university wishes to dismiss a student for non-academic reasons, certain due process procedures must be followed. Courts often cite the 1961 5th Circuit case of Dixon v. Alabama State Board of Education[21] for the minimum elements of due process required in that situation:

1) A notice that contains a statement of the specific charges and the grounds which, if proven, would justify expulsion.
2) A hearing which gives the governing board or the administrative authorities of the college or university an opportunity to hear both sides in considerable detail.

[19] Greenhill, cited above, fn 1.

[20] There is one area in which federal law mandates the institution have an internal disciplinary procedure: sexual offenses. 486(c) of the Higher Education Amendments of 1992, Pub. L. No. 102–325, amending the Campus Security Act, Pub. L. No. 101–542 (codified at 20 USC. 1092).

[21] 294 F.2d 150 (5th Cir 1961).

A full-dress judicial hearing, with the right to cross-examine witnesses, is not necessarily required.

3) The right to the names of the witnesses against the student and an oral or written report on the facts to which each witness testified. Note: This assumes no face to face confrontation by the student with the witnesses.
4) The opportunity to present to the institution's governing board, or at least to an administrative official of the college or university, the student's own defense against the charges and to produce either oral testimony or written affidavits of witnesses on the student's behalf.
5) Presentation of the results and findings of the hearing in a report open to the student's inspection if the hearing is not before the governing board.[22]

b) Suspensions

A public college or university contemplating a student suspension for non-academic misconduct generally need not give the student the same due process it would for a dismissal. The U.S. Supreme Court has said, however, that due process requires that even secondary school students facing suspension must be given two things:

1) some kind of notice and
2) some kind of hearing.[23]

The U.S. Supreme Court has recognized the flexibility inherent in due process. It has said the timing of the notice and the nature of the hearing depend upon the appropriate accommodation of the student's and the institution's interests.[24] This means that before a decision to suspend is made, the student must receive:

1) oral or written notice of the charges and, if the student denied the charges,
2) an explanation of the evidence the authorities had and
3) an opportunity to present his or her side of the story.[25]

All the other due process protections that would be available in a more formalized procedure in court are not required.

Note: A public institution does not have to hold a pre-suspension hearing in all cases. If a student's presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process, the student may be immediately removed from school. In such cases, the necessary notice and a rudimentary hearing should follow as soon as practicable.[26]

Courts have upheld such immediate suspensions. One such example involved a dean's immediate suspension of a student after a suspicious residence hall fire.[27] The

[22] Dixon, at 158-59.
[23] Goss v Lopez, 419 US 565 (1975).
[24] Id.
[25] Id.
[26] Id.
[27] Picozzi, cited above, at 1578, fn 2.

student challenged the suspension on due process grounds. The court upheld the dean's action because the court recognized that the dean had a duty to protect the security of the academic community.

The dean had also refused to write the student a letter of good standing to another school prior to a hearing. The court upheld that refusal, saying a dean must have the authority to take prompt and reasonable preliminary action that preserves a school's interest without finally and permanently depriving a student of his/her interest in continuing his/her education.[28]

c) Additional Guidelines for Conducting Hearings

Since the 1960's additional procedural guidelines have emerged from the courts. The following elements of due process have been discussed and reviewed by at least one court, but other courts might dispute these decisions:

1) Clear standards: Institutional proceedings must be based on standards of conduct that are expressed in clear and narrow terms that are not unconstitutionally vague or overbroad under the First Amendment.[29]

2) Type of conduct regulated (including off-campus conduct): The standard of conduct that a college seeks to impose must be one relevant to the lawful mission, process or function of the educational institution.[30] This means a college or university may discipline a student for off-campus actions if, for example, the institution demonstrates it "has a vital interest in the character of its students" and the off-campus behavior acts "as a reflection of a student's character and his fitness to be a member of the student body."[31]

3) Notice: Notice to the student of the nature of the allegations against the student may be oral or written in the case of a suspension of 10 days or less.[32] If more severe penalties are contemplated, written notice may be required.[33] The timing and content of the notice and nature of the hearing will depend on the appropriate accommodation of the competing student and institution interests involved.[34]

4) Opportunity to be heard: Normally a student has the right to appear in person at his or her disciplinary hearing.[35] There may be exceptions to this practice, however, due

[28]Picozzi, at 1579.

[29]Esteban v Central Missouri State College, 415 F2d 1077 (8th Cir 1969), cert. denied, 398 US 965 (1970).

[30]Id.

[31] Kusnir v Leach, 439 A2d 223, 226 (Pa 1982). Accord, Sohmer v Kinnard, 535 F Supp 50, 54 (D Md 1982), (competent authorities, using established procedures, judge the actions of a student to be "detrimental to the interests of the University community"). Hart v Ferris State College, 557 F Supp 1379, 1380 (WD Mich 1983), Wallace v Florida A & M Univ, 433 So 2d 600 (Fla App 1 Dist 1983), (the student's conduct interfered with the educational and orderly operation of the school in light of the school's aggressive stance on the ethical conduct of its students).

[32]Goss, cited above, fn 23.

[33]See, e.g., Esteban, cited above.

[34]Goss, cited above, fn 23.

[35]Crook v Baker, 813 F2d 88 (6th Cir 1987).

to the student's distance from the hearing site or his or her inability to attend.[36]

5) Double jeopardy: A student is not placed in double jeopardy if the institution takes disciplinary action for the same offense for which criminal sanctions may be imposed. Double jeopardy only prevents successive criminal or punitive sanctions imposed by the same entity. There also can be no double jeopardy where sanctions have two different underlying purposes. In a student disciplinary hearing the institution's interest is in protecting the campus community. The purpose of the criminal proceeding is the public's need for justice.[37]

6) Confrontation and cross-examination: The U.S. Constitution does not require confrontation or cross-examination of witnesses at a student misconduct hearing.[38] However, courts which have reached this conclusion based their decisions on facts which indicated that some form of cross-examination was in fact afforded the student. Other courts have suggested where suspension or expulsion may result, the right to cross-examination is preferable.[39]

7) Legal representation: Most courts have declined to grant students the right to counsel in disciplinary proceedings.[40]

In certain cases, however, particularly where criminal charges are also pending against the student arising out of the same set of facts that form the basis for the misconduct hearing, due process may require the student be allowed to have counsel present to advise the student. The student still does not have the right to have the counsel actually participate in the hearing.[41]

Another exception is when the institution proceeds through counsel. When the university uses counsel in the hearing to present its case against a student, the student is entitled to counsel.[42]

8) Self Incrimination: A constitutional right against self incrimination exists only in criminal matters. A student may choose to remain silent during an institutional disciplinary proceeding but that silence may be used against the student.[43]

9) Timing When Criminal Charges Are Pending: A student generally does not have the right to prevent a university hearing until after his or her criminal trial, if the

[36]Martin, cited above, fn 2.

[37]Paine v Bd of Regents of Univ of Texas Sys, 355 F Supp 199 (WD Tex 1972), aff'd 474 F2d 1397 (5th Cir 1973).

[38]Dixon, cited above, fn 21.

[39]Esteban, cited above, fn 29.

[40]Hall v Medical College of Ohio at Toledo, 742 F2d 299 (6th Cir 1984), cert. denied, 469 US 1113, 105 SCt 796 (1985); Nash v Auburn Univ, 621 F Supp 948 (DC Ala 1985), aff'd 812 F2d 655 (11th Cir 1987).

[41]See, e.g., Gabrilowitz v Newman, 582 F2d 100 (1st Cir 1978); Boyle v Newman, 414 A2d 491 (Ct App RI 1980); McLaughlin v Massachusetts Maritime Academy, 564 F Supp 809 (D Mass 1983); Hart, cited above, fn 2.

[42]French v Bashful, 303 F Supp 1333 (ED La 1969), appeal dismissed, 425 F2d 182 (5th Cir 1970), cert denied, 400 US 941 (1970).

[43]Picozzi and Hart, cited above, fn 2.

student has the right to remain silent at the university hearing.[44] Institutions may or may not want to grant delays in specific instances.

10) Transcript: A transcript or recording of the hearing is not required.[45] However, although the absence of a written transcript has not been a ground for reversing a disciplinary action, several courts have required the institution to keep some form of record. One court stated that either party may record the proceedings.[46]

11) Open or closed hearings: Courts do not allow a student to choose whether the student's disciplinary hearing is open to the public or closed.[47] State open meeting laws may require an open or closed hearing and should be reviewed to determine if they apply to this type of proceeding.[48]

12) Statement of reasons for the decision: There is no requirement that the hearing board issue written findings of fact or conclusions of law similar to those required under the Federal Rules of Civil Procedure.[49] However, state administrative laws may require such even though they are not constitutionally mandated. If a criminal act is involved, such a statement of reasons may also be required.[50]

d) Contractual Obligations

In addition to complying with due process when disciplining students, public institutions must be careful not to breach any contractual obligations they have with their students. The same is true of private institutions.[51]

Courts consider the rules and regulations published by a public or private institution to form a contract between a student and the institution. Courts also have found that statements in college and university handbooks, brochures and other institutional publications can form the terms of additional contractual obligations of the institution. Courts allow students to sue public and private institutions for breach of contract if the institutions fail to abide by those statements and promises.

Courts examine closely the published disciplinary procedures promulgated by higher education institutions. If an institution varies materially from those procedures; e.g., if a university fails to hold a hearing despite a university regulation saying one will be provided, a court would probably rule that a breach of contract.[52]

[44]Wimmer v Lehman, 705 F2d 1402 (4th Cir 1983), cert denied, 464 US 992.

[45]Jaksa, cited above, fn 2.

[46]Esteban, cited above, fn 29.

[47]Zanders v Louisiana State Bd of Educ, 281 F Supp 747 (WD La 1968).

[48]See, e.g., Morrison v Univ of Oregon Health Sciences Center, 685 P2d 439 (Or App 1984).

[49]Herman v Univ of South Carolina, 341 F Supp 226 (D SC 1971), aff'd, 457 F2d 902 (4th Cir 1972).

[50]See, e.g., Kusnir, cited above, fn 31.

[51]Cloud v Trustees of Boston Univ, 720 F2d 721, 724 (1st Cir 1983); Slaughter v Brigham Young Univ, 514 F2d 622, 626 (10th Cir 1975), cert denied, 423 US 898 (1975); Corso v Creighton Univ, 731 F2d 529 (8th Cir 1984).

[52]Tedeschi v Wagner College, 427 NYS2d 760, 404 NE2d 1302 (Ct App 1980), rev'g 417 NYS2d 521 which aff'd 402 NYS2d 967; Lightsey v King, 567 F Supp 645 (ED NY 1983); Morrison, cited above.

However, if a college or university fails to comply strictly with its written procedures and the omission does not amount to a substantial, material or prejudicial violation of its rules, a court will generally not invalidate the disciplinary action.

For example, a student challenged a college's failure to allow the student to confront witnesses during the student's disciplinary hearing. The student cited the college's bulletin statement that "due process is followed in all disciplinary cases."[53] The reviewing court found no breach of contract, however. It said that solid evidence supported the college's conclusions about the student and there was no showing of harm resulting from the college's failure to allow the student to confront witnesses.[54] Courts also do not require literal adherence to institutional rules when a dismissal rests upon experts' judgments as to academic or professional standards of conduct or when a state's interest in the substance of the matter outweighs the individual's rights. In an Indiana case, a dental student claimed a school had not followed all its written procedures in his termination. The court found substantial compliance because it believed placing an incompetent or irresponsible dentist in active practice would ignore the institution's administrative duty to the public.[55]

In a different academic dismissal case, a court reached the same result. The court found no abuse of discretion in a school's failing to follow its rules saying that literal adherence to internal rules is not required when a dismissal rests upon expert judgements as to academic or professional standards and such judgements are fairly and non-arbitrarily arrived at.[56]

2. AT PRIVATE INSTITUTIONS

Administrators at private institutions have more latitude than those at public institutions in taking disciplinary action. This is because private institutions are generally not subject to the Fourteenth Amendment of the U.S. Constitution.

However, in meting out discipline for non-academic misconduct, private institution administrators must not act 1) arbitrarily or capriciously or 2) out of conformance with their institution's published regulations. The breach of contract situation that can result from the latter is described in the section above.

Because private institutions are not subject to the Fourteenth Amendment, courts have consistently held that students at private institutions have no due process right to a hearing for non-academic misconduct.[57] Courts have noted that while it might be better policy to hold a hearing whenever any disciplinary action is contemplated, as a matter of law private institutions are not required to do so.

[53] Clayton v Trustees of Princeton Univ, 608 F Supp 413 (NC NJ 1985).

[54] Life Chiropractic College Inc v Fuchs, 337 SE2d 45, 176 Ga App 606 (1985).

[55] Neel v Indiana Univ Bd of Trustees, 435 NE2d 607 (Ind App 1982).

[56] Solair v State Univ of New York, 388 NYS2d 453, 456 (SCt, App Div 1976), rev'd on other grounds, 406 NYS2d 276 (1978); Bonwitt v Albany Medical Ctr School of Nursing, 353 NYS2d 82 (SCt 1973); see also, Balogun v Cornell Univ, 333 NYS2d 838 (SCt 1971).

[57] See John B. Stetson Univ v Hunt, 102 So 637 (Fla 1924); Dehaan v Brandeis Univ, 150 F Supp 626 (D Ct Mass 1957).

Some courts find it difficult to grant a private institution complete discretion to take disciplinary action without affording any hearing to a student. These courts will sometimes find an implied contract of fair dealing between the student and the institution.

In one case a court said, "the college or university's decision to discipline that student [must] be predicated on procedures which are fair and reasonable and which lend themselves to a reliable determination."[58] Another court said, "The standard of basic procedural fairness is to be used to measure the student disciplinary proceedings. The key to the standard is reasonableness."[59] On the other hand, courts tend to allow private institutions some discretion in fashioning the standard of process to be applied. For example, a court did not overturn the expulsion of a student even though he did not have a hearing or even an interview with the sanctioning administrator before his dismissal. The court found it was adequate that the student was given a right to present witnesses and offer his version of the facts at an appeal hearing.[60]

B. RELATED TO ACADEMIC PERFORMANCE

1) PLAGIARISM AND CHEATING

In cases of plagiarism and cheating, misconduct may be inextricably mixed with academic matters. As such, courts often consider such cases to revolve around factual issues rather than academic judgments. In addition, disciplinary actions for plagiarism and cheating are more stigmatizing and may have a greater impact on the student's future. They therefore may be seen as calling for procedural protections.[61] A safe practice for public institutions to follow is the due process procedures described above for student non-academic misconduct hearings in a plagiarism or cheating situation.

Private institutions may punish students for plagiarism without needing to decide if it is academic rather than non-academic misconduct as long as the institution's own rules regarding such are followed. In addition, private institutions can discipline students for conduct that might go unpunished at a public institution or be dealt with less harshly.

For example, a doctoral candidate at a private institution submitted two articles for publication, using his advisor's name as his co-author without the advisor's knowledge. He did it to improve their chances for publication. The court upheld the school's dismissal of the graduate student for such an act stating that such acts were "dishonest" in the context of a church school.[62]

A similar example is a case in which a university charged a student in her final semester with plagiarism on a term paper. The student had taken sections from a particular book recommended by her professor verbatim without using quotations

[58] Kwiatkowski v Ithaca College, 368 NYS2d 973 (SCt 1975).

[59] Swanson v Wesley College, Inc, 402 A2d 401 (Del Super Ct 1979).

[60] Mitchell v Long Island Univ, 309 NYS2d 20 (SCt 1970).

[61] See, e.g., Jaksa, cited above, fn 2.

[62] Slaughter v Brigham Young Univ, 514 F2d 622 (10th Cir 1975), cert denied, 423 US 898 (1975).

marks or footnotes. The book was the only work cited in the paper. The court rejected the student's demand to be represented by counsel at a university hearing. The university found the student guilty and her degree was withheld for one year. The trial judge, while stating that he personally believed the penalty to be too harsh, upheld the university's right to impose it as reasonable.[63]

In a different case, a student submitted a fraudulent letter attesting to his status as an employee of a university in order to retain his university-owned apartment. When the fraud was discovered, the student was dismissed prior to his re-enrollment as a student. The lower appellate court said the university's action was arbitrary and capricious, but the higher appeals court disagreed and upheld the institution's decision. The high court adopted the position of the dissent in the lower court. The dissent had said that the student's character was a key element in the university's graduate program, and therefore the fraudulent submission was of legitimate concern to the university. The court held that the student's action evinced a degree of dishonesty and lack of character that was a matter of vital interest to an academic institution which may reasonably expect honesty and fairness by its students in dealing with it.[64]

2) REVOCATION OF A DEGREE OR CREDITS

If a student's plagiarism or fabrication of data is discovered after an academic degree is awarded, a public institution can revoke that degree. However, that can only occur after observing appropriate due process procedures.[65]

The due process required to revoke a degree is to provide the student with notice of the academic deficiencies discovered and to give the student an opportunity to be heard as to those deficiencies. Cross examination of witnesses is not required.

The same principles apply to revocation of credits for fraudulent acts.[66] Notice and opportunity to be heard must precede the credit revocation at a public institution.

For example, if a public college or university learns from a prospective employer about a graduate's alteration of his or her transcript, the institution may wish to take action to revoke the student's degree or certain academic credits. Before this can occur, the institution must give notice to the student of the discovery of the fraudulent act and the institution's intended response and allow some sort of opportunity for the student to present his or her explanation for the transcript alteration.

At a private university, a degree or credits can be revoked for academic reasons if some minimal procedural protections exist to ensure at least fundamental fairness.[67] The courts will determine the sufficiency of the procedures based on the facts and

[63] 1982 Napolitano v Trustees of Princeton Univ, 453 A2d 279, aff'd 453 A2d 263 (NJ Super Ct App Div 1982).

[64] Harris v Trustees of Columbia Univ, 479 NYS2d 216 (1984), rev'g, 470 NYS2d 368 (1983).

[65] Crook, cited above, fn 35. Waliga v Bd of Trustees of Kent State, 488 NE2d 850, 22 Ohio St. 3d 55 (1986).

[66] Merrow v Goldberg, 672 F Supp 766 (D Vt 1987).

[67] Abalkhail v Claremont Univ Ctr, 2nd Civ No. 13014012 (Cal AD 1986), cert denied, 479 US 853, 107 SCt 186 (1986).

circumstances of each case. In one case it was sufficient that the student received adequate notice of the charges against him, the possible consequences, and of the procedures to be used.

V. DIFFICULT OR TROUBLED STUDENTS

Occasionally a college or university administrator must deal with a student with emotional or mental problems. Sometimes the institution will want an evaluation of a student's fitness to remain a part of the campus community. An institution can only require a student to have such an evaluation against the student's wishes if its rules and regulations make such a condition of continued enrollment.

In such situations a stigma may occur from a psychological evaluation that will affect the reputation of the student and affect the student's ability to pursue future academic endeavors or even subsequent employment. At a public institution, requiring a psychological evaluation might give rise to a liberty right of the student, if the results are not kept confidential.

Such a liberty right would mean that a student should have a due process hearing prior to the mental examination. The institution might be forced to show a compelling state interest in having the exam take place, such as the student posing a serious threat to him or herself or others.[68]

If the institution's own rules are silent or state only that the institution may request, but cannot require an evaluation, it may not be possible to condition a student's continued enrollment on a medical review. In such a situation, the institution may decide a student's suspension or dismissal from the institution is the only solution.

Difficult or troubled students can be suspended or dismissed in that way only as a consequence of their actions or to protect the safety of all students. A college or university cannot discipline a student just because of an emotional or physical disorder. Such a condition is protected by federal statutes, specifically, Section 504 of the 1973 Rehabilitation Act and the Americans with Disabilities Act (ADA.)[69]

Section 504 provides that "[n]o otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[70]

The Act applies to both public and private institutions. If one program or activity at an institution receives federal funding, the entire institution is covered by the Act.

In 1990 Congress enacted the ADA.[71] That law prohibits excluding qualified students from participation in or denying them the benefits of the services, programs or activities of a public or private institution.

[68]Gorman v. Univ. of Rhode Island, 646 F. Supp 799 (D. RI 1986), modified, 837 F.2d 7 (1st Cir. 1988).

[69]29 USC. 794, et seq., 42 USC. 1201, et seq.

[70]29 USC. 794.

[71]42 USC. 1201, et seq.

In order to successfully discipline a troubled or difficult student without violating these laws, the student's behavior or failure to make academic progress must be separated from the physical, mental or emotional problem that is contributing to the behavior problem. The key question for a court will be whether the student would have been disciplined for the behavior or lack of academic progress if the student had no handicap.

For example, a suicidal and violent medical student sued her university alleging handicap discrimination when it denied her readmission. The court found the disciplinary action was based on the student's lying about her medical history of "borderline personality" disorders and therefore no discrimination had occurred.[72] Likewise in another case, a court upheld a university's action in expelling a psychotic student because the action was based on the student's behavior and not the underlying medical problem.[73]

An institution may take action to protect the life and safety of other students without violating a law against handicap discrimination. For example, a university has the right to restrain physically and later expel a student whose loss of control over his behavior poses danger to other students and administrators.[74]

Note that an alcoholic or drug dependent student may also be viewed as having a handicap.[75] However, if as a consequence of the drug or alcohol problem the student has a poor academic record or is disruptive, an educational institution can dismiss the student by focusing on those consequences.

Note also that AIDS or having HIV status is a handicap. A student with such cannot, on that basis alone, be prevented from continuing in a program if the student is otherwise qualified for the program and, by reasonable accommodation to the student's disability, the student can participate in the program. Such an accommodation may not be possible in certain academic programs, such as the health professions.[76] To prevent litigation in this area, it is best for colleges and universities to make clear what behavior will be tolerated. Punishment should then be based on violations of those rules, not on the mental or physical shortcomings of individuals.

VI. FRAUD IN ADMISSION

As stated above, once a student has matriculated at a public institution, courts recognize that the student obtains a property interest in continuing the student's education there. Therefore, courts require that there be some due process—notice and opportunity to be heard—accorded to that person before admission can be rescinded by the school. For example, a student was admitted to a public university's law school.

[72] Doe v New York Univ, 666 F2d 761 (2nd Cir 1981).

[73] Corso, cited above, fn 51.

[74] Furth v Arizona Bd of Regents, 676 P2d 1141 (Ariz App 1983).

[75] Anderson v University of Wisconsin, 841 F2d 737 (7th Cir 1988).

[76] Doe v Washington University, 780 F Supp 628 (ED Mo 1991).

He failed to disclose complete or accurate information on his admission form concerning his criminal record and present incarceration. The court found some minimal due process was due before the law school could rescind his admission.

In that instance, the court held that an offer to the student to present his side of the story in writing was sufficient to meet the university's due process burden of affording the student an opportunity to be heard. The court noted, the school might be constitutionally required to provide a hearing at which an admittee could appear in person under different circumstances such as where he disputed the facts underlying the school's determination that the application was incomplete or untruthful.[77]

If a student has actually commenced studies at a public institution and is to be expelled for fraudulent application, courts require more due process protections. In an instance in which a student had completed all requirements for a degree, a court found due process entitled the student to a written notice of charges, a sufficient opportunity to prepare to rebut charges, an opportunity to have retained counsel at any hearings on charges, confrontation of accusers, presentation of evidence on his own behalf, an unbiased hearing tribunal, and an adequate record of the proceedings.[78]

Private institutions do not have to provide due process if they dismiss students with fraudulent applications. However, as with other disciplinary actions, private schools must follow their own published procedures regarding such actions or be liable to a student for a breach of contract.

Courts recognize that both public and private colleges and universities have a particularly strong interest in the integrity of their programs and therefore need to be able to discipline their students for fraudulent actions. For example, a court found that although a student had completed all requirements for his degree, since he had committed fraud to obtain admission to medical school, he could be expelled as, "... fraud is an all-pervading vice and whatever it touches it taints throughout, part cannot be bad and the rest good."[79]

VII. TERMINATION OR DISCIPLINE OF FACULTY AND OTHER ACADEMIC EMPLOYEES

A. AT CONTRACT END OR WITHOUT A CONTRACT

An academic employee such as a graduate teaching or research assistant or an untenured faculty member who does not have a contract granting some assurance of continued employment (such as "just cause" termination protection) does not have a property right in employment with a public or private institution. Such an employee is said to be terminable "at will." This means the employee can be terminated without

[77]Martin, cited above, fn 2.

[78]North v West Virginia Bd of Regents, 332 SE 2d 141 (W Va 1985).

[79]Id.

notice or a hearing for any reason that does not violate public policy or federal or state laws against discrimination. Similarly, a faculty member or graduate teaching or research assistant who is at the end of his or her contract term can also be terminated without notice or a hearing.

A leading case which eroded an employer's authority to terminate an employee at will, followed by some other jurisdictions, was Toussaint v Blue Cross.[80] In that case the Michigan Supreme Court said that the general rule in employment law is that an employer may discharge an employee at any time, with or without cause, as long as the discharge does not violate a statutory right, such as the civil rights law.

However, the Toussaint court said, the employer can be held to have changed the "at will" employment status to one where the employee can only be discharged for good cause. This change in the relationship can occur through an express oral or written agreement that says the employee can 1) only be discharged for good cause or 2) by the employer's policy statements which give rise to a legitimate expectation by the employee the employee can only be discharged for good cause. In the Toussaint case, for example, an interviewer's comment that "as long as he [Toussaint] did his job that he would be with the company" created a jury question as to whether the employee had thereby been given a contract not to be discharged except for "just cause."[81]

Both public and private colleges and universities can unknowingly change an "at will" relationship to a good cause one by making oral or written statements that an academic employee will be fired only for good cause. If such statements are made by an administrator with authority to hire and fire, or are contained in a policy manual or handbook, implied contracts may exist.

Legal counsel must examine such statements individually to determine if a contract has been created under state law. Caution should obviously be exercised before making any such promises. Often it is only the governing board of an institution that has authority to make such statements and it is excellent preventive policy for an institution to promulgate a policy to the effect that only the governing board of the institution or its president (or other limited individuals) has the authority to make employment promises.

Even though a terminable "at will" academic employee does not have a property interest in continued employment, the employee might have a liberty interest in his or her name and reputation that would be impacted if public disclosure of the reasons for his or her discharge were a possibility.[82] Such a situation might arise if the employee was being terminated for fraudulent credentials or for scientific misconduct, for example.

[80]408 Mich 579, 292 NW2d 880 (1980).

[81]Id.

[82]Bishop v Wood, 426 U.S. 341, 96 SCt 2074 (1976).

Under those circumstances, or when a "just cause" relationship has been created, a public institution can not terminate the faculty member without affording him or her Fourteenth Amendment due process. The employee would have a right to a hearing prior to termination. A private institution has no such obligation because the Fourteenth Amendment does not apply to its actions. Note, however, that if a public or private institution's personnel regulations establish guidelines to be followed prior to dismissal,[83] they may give a non-tenured, non-contract employee a right to a pre-termination hearing. For this reason, a college's or university's employee handbook must be carefully studied before dismissing an employee.

B. WITH TENURE OR DURING A CONTRACT'S TERM

The contractual employment relationship can take a form defined by a contract of tenure. Although each institution is free to specify exactly what its tenure contract means, tenure contracts are generally characterized by their indefinite term, with provisions that tenure can be terminated only for such reasons as cause, resignation, medical disability, retirement, retrenchment due to financial exigency, or program elimination.

Tenure bestows increased prestige, compensation and freedom.[84] However, it does not give a faculty member the right to teach any particular course, to have any particular office or laboratory space, to receive a particular salary or hold any particular position in a department.

Tenured and academic employees with contracts, giving some assurance of continued employment, have property rights that arise from their contracts with an institution. Those individuals can be terminated prior to the expiration of their contracts only for reasons stated in their contracts. Careful review of the contract language or causes for tenure termination should preclude any such action to be sure those conditions are clearly met.

Most institutions state as causes for discipline or termination of tenured faculty, violation of institutional policies, incompetence, insubordination, neglect of duty or failure to perform duties, criminal or immoral behavior, abuse of students (including sexual harassment), and scientific misconduct or research fraud.[85]

At public institutions, tenure means that notice and an opportunity to be heard must precede termination of employment. An employee whose contract has not expired also has those due process protections. Thus, for example, if fraudulent credentials are alleged to have been used to obtain employment or scientific misconduct is alleged to have occurred, a pre-termination hearing would be required.[86] The employment

[83] Id.

[84] Univ Education Assoc v Regents of the Univ of Minnesota, 353 NW2d 534 (Minn 1984).

[85] Stensrud v Mayville State College, 368 NW2d 519 (ND 1985).

[86] Riggins v Bd of Regents Univ of Nebraska, 740 F2d 707 (8th Cir 1987) held that cross examination of witnesses is not necessary in such a situation. See also Seibert v State of Oklahoma, 867 F2d 591 (10th Cir 1989).

contract can be express or implied. A document does not have to be labeled a "contract" for it to be one. A contract of employment might, for example, consist of a letter offer that was accepted by the employee. It might arise from statements in a faculty handbook about length of appointments. In some jurisdictions, oral conversations can also establish contract terms.

C. ACADEMIC FREEDOM

Both tenured and untenured faculty at private and public institutions enjoy the right to academic freedom in their teaching and research.[87] While academic freedom includes freedom of utterance and action within and without the classroom,[88] it does not protect classroom speech that is unrelated to the subject matter, at variance with the prescribed curriculum or in violation of federal or state anti-discrimination laws. Such speech can be the reason for discipline or termination.[89]

Speech that disrupts the educational environment is also not protected by academic freedom. Academic freedom does not cover non-cooperative and aggressive behavior. An institution can discipline or terminate a faculty member for such actions.[90]

Academic freedom is also not a license for activity at variance with job-related procedures and requirements, nor does it encompass activities which are internally destructive to the proper function of the university or disruptive to the education program.[91]

At private schools, the faculty contract may describe the limits of academic freedom. Public institutions must respect constitutional protections of free speech in addition to whatever is protected in their faculty contracts.

VIII. SPECIAL ISSUES

A. SCIENTIFIC MISCONDUCT

Scientific misconduct has been defined in many ways, but the current preferred definition within the academic community is the fabrication or falsification of data or plagiarism in a scientific research project.[92] A student or a faculty member can commit

[87] Perry v Sindermann, 408 US 593 (1972).

[88] Jeffries v Harleston, 820 F Supp 741 (SDNY 1993).

[89] Clark v Holmes, 474 F2d 929 (7th Cir 1972); Hetrick v Martin, 480 F2d 705 (6th Cir 1973).

[90] Harden v Adams, 760 F2d 1158 (11th Cir 1985); Kelleher v Flawn, 761 F2d 1079 (5th Cir 1985); Adamian v Jacobsen, 523 F2d 929 (9th Cir 1975); Chitwood v Feaster, 468 F2d 359 (4th Cir 1972); Jawa v Fayetteville State Univ, 426 F Supp 218 (EDNC 1976).

[91] Statsny v Bd of Trustees of Central Washington Univ, 647 P2d 496, 32 Wash App 239 (1982).

[92] For the National Science Foundation's (NSF's) definition of misconduct, see 45 CFR 689.1; for the Public Health Service's (PHS's), see 42 CFR 50.102.

scientific misconduct. The due process that should be afforded before disciplinary action is taken against the perpetrator of scientific misconduct should be consistent with that afforded for other types of cheating, plagiarism or other fraudulent acts, (as described above.)

Colleges and universities are required by federal regulations to establish uniform policies and procedures for investigating instances of alleged or apparent misconduct involving research or research training, applications for support of research, or training or related research activities that are supported with federal funds.[93] An institution must comply with these procedures when investigating a student or faculty member or risk a breach of contract action by the person being investigated.

Federal regulations provide that the institution must make an inquiry into allegations of possible misconduct. The institution must notify the federal government if, following the inquiry, an investigation appears warranted.[94]

The sharing of the name of the alleged perpetrator with the federal government arguably affects the alleged perpetrator's liberty interest in his or her reputation. It therefore creates a need for due process in an inquiry conducted by a public institution. While the courts have yet to develop much case law in this area, it is arguable that the rudiments of due process, notice and an opportunity to be heard, should be provided to the subject of the inquiry, unless to do so would result in immediate damage to persons or property.

Ownership of data can be a troubling area within research. Disputes can be avoided by discussing the ownership of data at the outset of a project and entering into a written agreement about it. An institution may have policies regarding ownership of data, and, if so, they would control unless the institution agrees to waive them.

Without such documentation, a court will examine all the evidence, written and oral, as to the creation of the data, and review any institutional or accepted academic practice regarding ownership of data in order to resolve the issue. Judicial solutions in this fact-bound type of matter are rarely satisfactory to the parties involved. Attention to the issue of ownership at the commencement of a project can save much difficulty at the end.

B. SEXUAL HARASSMENT

The U.S. Supreme Court has defined sexual harassment in the workplace as:

> unwelcome sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature. . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, [these two are also known as 'quid pro quo' sexual harassment] or (3) such conduct

[93] 42 CFR 50.103(c)(1); 45 CFR 689.3(d).
[94] 42 CFR 50.103(d); 45 CFR 689.3(a).

> has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment [this is also known as 'hostile or abusive environment' sexual harassment.][95]

Public and private colleges and universities can be held liable for quid pro quo harassment by their faculty and academic administrators towards subordinate faculty and staff under one federal law[96] and towards students under a different federal law.[97] A single incident of quid pro quo harassment, if serious enough, can be sufficient for liability to occur.[98]

Public and private colleges and universities can also be liable for abusive environment sexual harassment by faculty and academic administrators towards subordinate or peer faculty and staff. Such liability occurs when the college or university knows or should have known that the harassment was occurring or the harassing employee has authority to make employment decisions regarding the employee being harassed.[99]

To be actionable, abusive environment harassment must be pervasive and continuous. An isolated, sporadic incident will not be sufficient to find this type of harassment has occurred.[100]

An employee's or student's psychological wellbeing does not need to be seriously affected for him or her to bring a claim of abusive sexual harrassment. Conduct that a reasonable person would find hostile or abusive is enough to be actionable if the employee or student also perceives the conduct to be abusive.[101]

Colleges and universities are able to prevent liability for sexual harassment by their faculty and administrators by 1) promulgating a procedure to employees and students for receiving and addressing complaints of sexual harassment and 2) taking prompt corrective action when a complaint is received.[102]

The procedure must be one that encourages employees and students to come forward with complaints. For example, a court would probably look with disfavor on

[95]Meritor Savings Bank, FSB v Vinson, 477 US 57, 106 SCt 2399, 2405 (1986); Harris v Forklift Systems, _US _, 63 FEP cases 225 (1993).

[96]Title VII of the Civil Rights Act of 1964, 42 USC, 2000e-2, Meritor at 2408.

[97]Title IX of the Education Amendments of 1972, 20 USC, 1681 et seq; Franklin v Gwinnett County Public Schools, 112 SCt 1028 (1992).

[98]See, e.g., Downes v Fed Aviation Admin, 775 F2d 288, 291 (Fed Cir 1985), Joyner v AAA Coop Transp., 597 F Supp 537 (MD Ala 1983), aff'd, 749 F2d 732 (11th Cir 1984).

[99]Meritor at 2408.

[100]See, e.g., Scott v Sears, Roebuck & Co., 798 F2d 210 (7th Cir 1986); Freedman v American Standard, 41 FEP 471, 476 (D NJ 1986), aff'd, 833 F2d 304 (3rd Cir 1987); Volk v Coler, 638 F Supp 1555, 1556–7 (CD Ill 1986), rev'd in part, aff'd in part, 845 F2d 1422 (7th Cir 1988).

[101]Harris.

[102]Meritor at 2408–9.

a procedure that required all complaints to be made to a supervising administrator, first as that person might well be the alleged harasser.[103]

The courts have not defined what "prompt corrective action" is or means. Courts will decide if the action taken by an institution is sufficient based on such factors as the seriousness of the offense, the due diligence exercised in an investigation of a complaint, the corrective action sought by the harassed person, the type and speed of discipline meted out to the offending faculty or administrator, the impact of the resolution on the harassed person and whether the problem persisted thereafter.[104]

Consensual relations between faculty and students or faculty and other faculty is a controversial subject in the sexual harassment discussion. Some colleges and universities believe that if one participant in a relationship is in a power position over the other, such as a teacher with a student in his or her class or on whose dissertation committee he or she sits, that the relationship cannot truly be consensual. Some colleges and universities, therefore, have adopted consensual relationship policies that range from forbidding relationships in such situations to strongly discouraging them to presuming them to be non-consensual if sexual harassment is later claimed. Opponents to such policies argue that they infringe on First Amendment rights of freedom to associate or rights of privacy. Most academics agree, however, that perceived or actual favoritism by a faculty member towards a student in such a relationship is a problem for other students and the academic integrity of the program.

Many states and some municipalities have enacted laws dealing with sexual harassment. A college or university administrator should be familiar with the requirements of those laws as they may be more stringent and specific than the federal laws in this area.

C. PRIVACY OF STUDENT RECORDS

The Family Educational Rights and Privacy Act (FERPA), a federal law, also known as the "Buckley Amendment,"[105] prohibits public and private colleges and universities from disclosing, without a student's written permission, most information in student records to anyone outside the institution or to those not in a position to need to know within the institution. The law also gives a student the right to inspect and obtain a copy of the student's own records.

FERPA applies to any current or former student. It does not apply to unsuccessful applicants for admission to the institution or admission to a different part of the institution, such as an undergraduate applying to graduate or professional school at the same institution where the student is an undergraduate.[106]

[103]Id.

[104]See, e.g., Barrett v Omaha Nat'l Bank, 726 F2d 424 (8th Cir 1984); Swentek v US Air, Inc, 830 F2d 552 (4th Cir 1987); Ford v Revlon, Inc, 153 Ariz 38, 734 P2d 580 (1987).

[105]20 USC 1232g, et seq.

[106]34 CFR 99.5(c).

The law means that a faculty member cannot post grades in a way that the individuals receiving those grades can be identified. Exams cannot be left in a place of public access because the grade received in a course is part of the private educational record of a student.

The law also means that a student has a right, unless voluntarily waived in a manner that is not coercive, to inspect any letters of recommendation about the student. The student can review evaluations and notes placed in the student's file, whether confidentiality was promised to the author or not.[107]

FERPA applies to all records maintained by the institution that directly relate to a student, not just the "student file," with few exceptions. Those exceptions are for an administrator or faculty's own notes that are used only by that individual and are not shared with anyone else, the campus security or police department's records, records relating to the student as an employee, and medical, psychiatric or psychological records not shared with the institution.[108] No promises of confidentiality should be extended, therefore, by an administrator to anyone about any other material kept in files pertaining to students.

Some courts dispute that FERPA applies to all records relating to a student. They say only information related to a student's application and attendance and the academic data generated while a student attends an institution are protected by the federal law. For example, a court has ruled that FERPA does not apply to the records of a student disciplinary board.[109]

The law does allow the institution to share "directory information" without written permission of the student. Such information consists of a student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.[110] A student, however, can file a written request, generally to the institution's registrar, that not even that information be disclosed without permission.[111]

FERPA also allows information from a student record to be shared without the student's prior written permission in a few limited circumstances. The information can be shared in response to a lawfully issued subpoena or a judicial order. An institution can share with the victim of any crime of violence the results of any disciplinary proceeding conducted by the institution against the alleged perpetrator of the crime.[112]

[107] 34 CFR 99.12(b).

[108] 34 CFR 99.3.

[109] Red & Black v Georgia State Univ Sys, 262 Ga 848, 427 SE2d 257 (1993); See also Bauer v Kincaid, 759 F Supp 575 (WD Mo 1991); Smith v Duquesne Univ, 612 F Supp 72 (WD Pa 1985), aff'd 787 F2d 583 (3rd Cir 1986).

[110] 34 CFR 99.3 and 99.31(a)(11).

[111] 34 CFR 99.37.

[112] 34 CFR 99.31.

Information from student files can be shared with the Comptroller General of the United States, the Secretary of Education, and state educational authorities. It also can be given to accrediting organizations and organizations conducting studies for the institution for developing, validating or administering predictive tests, student aid programs or improving instruction. It can be disclosed in connection with a financial aid application.[113]

Parents of a student do not have a right to see their child's educational record or to have information from it. However, institutions may disclose information from the record to parents if their child is claimed as a dependent by them for tax purposes.[114]

Educational information cannot be shared with law enforcement agencies without a court order or lawful subpoena. For example, the Federal Bureau of Investigation must obtain such legal process before it has a right to review a student's record or demand information from it, unless the request is for directory information or meets one of the exceptions described above.[115]

In addition to the federal law, state constitutions and state statutes may provide additional privacy rights to students. For example, one court held that a student's state constitutional right to privacy was violated when one institution gave a transcript it had received for one purpose to another entity without the student's permission.[116]

D. HATE SPEECH

In recent years a number of higher education institutions, public and private, have adopted rules or amended existing ones to make it a violation of university or college policy for a student to harass someone verbally on the basis of race, ethnicity, sex, color or religion. In 1992, the U.S. Supreme Court held a similar city ordinance unconstitutional on First Amendment freedom of speech grounds.[117] That decision provides guidance on how public institutions must write such rules to survive a court challenge.

The courts have long recognized that a public college or university can regulate the time, place and manner of speech on campus.[118] Public institutions also can prohibit the use of "fighting words" on their premises[119] "Fighting words" are words that, by their very utterance, are likely to provoke an immediate and violent reaction by a listener.[120]

[113] Id.

[114] Id.

[115] Id.

[116] Porten v. Univ. of San Francisco, 134 Cal. Rptr. 839 (1976).

[117] RAV v. City of St. Paul, 112 SCt. 2538 (1992).

[118] Heffron v. Int'l Society for Krishna Consciousness, 452 US 640, 101 SCt. 2559 (1981).

[119] Doe v. Univ. of Michigan, 721 F. Supp. 852, 862 (ED Mich. 1989); UWM Post v. Bd. of Regents of the Univ. of Wisconsin, 774 F. Supp. 1163 (ED Wis. 1991).

[120] Chaplinsky v. New Hampshire, 315 US 568, 62 SCt. 766 (1942).

However, both the time, place and manner rules and those rules prohibiting "fighting words" must be "content neutral." This means that an institution cannot regulate the type of speech that occurs on campus, even though the speech is offensive—even gravely so—to a large number of people.[121]

The 1992 Supreme Court decision held that rules that only punish certain types of "fighting words," such as regulations that prohibit slurs, invectives and threats based on race, ethnicity, color, or religion, are not "content neutral." Only a prohibition on the use of all "fighting words," would be content-neutral.[122] Therefore, if an institution wants to exclude "fighting words" that are based on race, ethnicity, color or religion, it must ban all "fighting words."

Additionally, colleges and universities should be familiar with their state laws on this subject as some state legislatures have placed restrictions on the disciplining of students alleged to have violated campus speech codes. For example, California law prohibits disciplining a student at a public college or university for using speech that would have First Amendment protection if uttered off-campus. That state's law also gives a student a cause of action against any institution that disciplines a student in violation of that law.[123]

Private institutions ordinarily are not subject to the requirements of the First Amendment for the same reasons they are not subject to the Fourteenth Amendment. Thus, unless private institutions have imposed upon themselves the requirement of compliance with the First Amendment through statements in brochures or handbooks, or unless state law requires they comply with the First Amendment, private colleges and universities can regulate the content of student speech on campus without the restrictions described above.

IX. LIABILITY OF AN INSTITUTION, ADMINISTRATION OR STAFF

A. LIABILITY FOR DEFAMATION

Faculty or administrators may be reluctant to evaluate a student or other faculty honestly and candidly because of fear of litigation for defamation. However, such evaluations carry little risk of personal liability under the law of defamation.

For example, a student sued an institution for defamation over faculty statements made in the course of an unfavorable evaluation of his clinical work. The court found the student had impliedly consented to publication of the evaluation within the institution. The court said,

[121]There are a very few exceptions to this rule that allow the prohibition of obscenity and libel. See, e.g., Miller v California, 413 US 15,22, 93 SCt 2607, 2613 (1973) (obscenity); Dun & Bradstreet v Greenmoss Builders, 472 US 749, 105 SCt 2939 (1985) (libel).

[122]RAV, cited above, fn 117.

[123]Calif. Ed. Code Ch. 5, 66301.

> "A person who seeks an academic credential and who is on notice that satisfactory performance is a prerequisite to his receipt of that credential consents to frank evaluation by those charged with the responsibility to supervise him."[124]

In another defamation case, a student sued a professor for writing a letter regarding a student's performance. The professor wrote the letter at the request of the university ombudsman to determine if the student's academic dismissal hearing should have been reopened. The court found the letter was intended to be confidential and therefore the professor had not "published" it. The court further held the sharing of information occurred on a "conditionally privileged" occasion, between two administrators concerned with a common issue. This also prevented the letter from being defamatory.[125]

Courts have made similar rulings regarding the evaluations of professors by each other.[126] Note that professors may obtain those peer evaluations, even though they are intended to be confidential, through discovery in litigation brought by themselves or a federal or state agency charged with investigating discrimination claims.[127] State law may also require the release of such evaluations with the name of the author deleted.[128]

B. LIABILITY FOR ALLEGED WRONGFUL ACTS

A college or university administrator or faculty member may be named at some time as a defendant in a lawsuit involving the institution. Most colleges and universities have written defense and indemnification policies that explain the extent to which the institution will provide legal counsel and pay legal expenses as well as any civil penalty that might be assessed in such a situation.

Generally, an institution will defend and indemnify an employee, including faculty members, if the employee was acting in good faith and within the scope of his or her employment at the time the incident occurred that gave rise to the lawsuit.

"Within the scope of employment" usually means the incident in question occurred while the employee was on the job. "Within the scope of employment" would not include an incident that arose in connection with a personal matter, or in outside employment, or in a matter that was not of college or university business. Depending on an institution's policy, it might include work done for a professional journal, or service on a professional board, especially if such was expected by the institution to be eligible for promotion.

An employee also must be "acting in good faith." This means that the employee acted with the honest and reasonable belief that he or she was undertaking an activity that was appropriate under the circumstances.

[124]Kraft v William Alanson White Psychiatric Foundation, 498 A2d 1145, 1149 (DC App 1985).

[125]Beckman v Dunn, 276 Pa Super 527, 419 A2d 583 (1980).

[126]Baker v Lafayette College, 516 Pa 291, 532 A2d 399 (1987).

[127]Univ of Pennsylvania v EEOC, 493 US 999, 110 SCt 577 (1990).

[128]See, e.g., Moskovitz v Lubbers, 182 Mich App 489 (1990), lv denied, 437 Mich 895 (1991).

Whether an employee meets the standard to be defended and indemnified by his or her institution will be decided by that institution, of course. An employee should familiarize him or herself with his or her college's or university's policy and discuss any concerns about coverage for particular activities with the policy's administrator before a lawsuit occurs.

X. CONCLUSION

The number of laws, regulations and cases which affect college and university administrators grows exponentially each year. It is beyond the capacity of this booklet to encompass all of them. This pamphlet also cannot substitute for the advice and assistance of your institution's legal counsel as to the peculiarities of the laws of your state and the requirements of your institution's own policies and rules. This pamphlet is best used to alert you to areas in which you should seek the advice of counsel so that your decisions may discourage legal challenge or, if they are reviewed by a court of law, so that they withstand judicial scrutiny.

XI. CHECKLIST TO MINIMIZE ACADEMIC LEGAL PROBLEMS

Student Misconduct Unrelated to Academic Performance

—if at a Public or Private Institution

1. Check institution's own rules and regulations for procedural requirements to be followed
2. Check local or state laws to determine if they contain any requirements to be followed
3. Check to be sure the disciplining administrator(s) has not acted arbitrarily or capriciously

—if at a Public Institution

1. If a property or liberty interest is involved and
   a. if a suspension is contemplated
      i. provide some kind of notice of the charges—oral or written if for 10 days or less—written if for more than 10 days
      ii. provide an explanation of the evidence the institution has against the student
      iii. provide an opportunity for the student to present his/her side of the story
   b. if a dismissal is contemplated
      i. provide written notice of the specific charges and the grounds for same
      ii. provide a hearing before an administrator or committee to hear both sides in some detail
         (a) Decide what due process procedures will be included (confrontation/cross examination of witnesses, presence or participation of attorneys, self-incrimination, etc.)
      iii. if no face-to-face confrontation of witnesses occurs, provide the student with the names of the witnesses and the facts to which each testified
      iv. provide the student a chance to present his/her own defense and the testimony of witnesses and/or the affidavits of same
      v. prepare a report of results and findings and provide same to the student

Difficult or Troubled Students

—if at a Public or Private Institution

1. Check to see if institution's own rules reserve the right to demand a psychological examination
2. Discipline only for the conduct, not the condition, of the student

—if at a Public Institution and results of the examination will not be kept confidential

1. Provide an opportunity to the student to be heard before the examination
2. Demonstrate that the student poses a serious threat to him/herself or others

Student Misconduct Related to Academic Performance

—if at a Public or Private Institution

1. Check institution's own rules and regulations for procedural requirements to be followed
2. Inform the student of the dissatisfaction with his/her performance in advance of the decision
3. Make sure the ultimate decision is careful and deliberate, not motivated by ill-will, bad faith or illegal discrimination and is not arbitrary or capricious

—if at a Public Institution and the fact of the decision will be made known outside the institution and may affect employment or future academic endeavors

1. Provide an opportunity to the student to be heard before an administrator or committee before the decision is final.

Fraud in Admission

—if at a Public or Private Institution

1. Check institution's own rules and regulations for procedures to be followed

—if at a Public Institution and studies have not been commenced

1. Provide notice of intention to rescind admission and why
2. Provide opportunity to be heard in writing, or, if facts are contested, in person

—if at a Public Institution and studies have been commenced or degree received

1. Provide a written notice of charges
2. Provide a hearing with opportunity to have counsel present, confrontation of accusers, presentation of evidence and some record of the hearing

Plagiarism and Cheating

—if at a Public or Private Institution

1. Check institution's own rules and regulations for procedures to be followed

—if at a Public Institution

1. Follow procedures for misconduct unrelated to academic performance above

Revocation of a Degree or Credits

—if at a Public or Private Institution

1. Check institution's own rules and regulations for procedure to be followed

—if at a Public Institution

1. Provide notice of the academic deficiencies
2. Provide an opportunity to be heard

—if at a Private Institution

1. Provide some minimal procedural protections, e.g. notice and procedures to be followed

Termination or Discipline of Faculty

—if at a Public or Private Institution

1. Check institution's own rules and regulations for procedures to be followed. If institution is unionized, review union contract for procedures to be followed
2. Determine if employee is "terminable at will" or at contract end—if so, can terminate or discipline without notice or a hearing for any reason that does not violate public policy or federal or state laws against discrimination
   Exception: if public disclosure of reasons for termination or discipline will occur, a hearing must precede action at a public institution
3. Determine if employee is tenured or holds an unexpired contract, express or implied—if so, can only terminate or discipline for reasons stated as part of the contract or for good cause. Notice and an opportunity to be heard must precede termination or discipline at a public institution

Scientific Misconduct

—if at a Public or Private Institution

1. Check institution's own rules and regulations for procedure to be followed
2. Conduct an inquiry into allegations that provides the alleged perpetrator with notice and opportunity to be heard unless to do so would result in immediate damage to persons or property
3. If an investigation appears warranted, notify the federal government of same
4. If discipline appears warranted, follow the procedures for misconduct unrelated to academic performance described above for students and for faculty, the ones for disciplining of faculty

XII. BIBLIOGRAPHY

I. GENERAL REFERENCE

Annotation: Action of Private Institution of Higher Education as Constituting State Action, or Action Under Color of Law, For Purposes of Fourteenth Amendment 42 USCS §1983, 37 A.L.R. Fed. 601 (1992).

Barr, Margaret J., Ed. *Student Services and the Law: A Handbook for Practitioners*. San Francisco, CA: Jossey Bass Publishers, 1988.

Bazluke, Francine T. *Defamation Issues in Higher Education*. Washington, DC: National Association of College ad University Attorneys, 1990.

Cole, Elsa Kircher and Barbara L. Shield, Eds. *Student Legal Issues*. Washington, DC: National Association of College and University Attorneys, 1989.

Kaplin, William A. *The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision Making*. Second Edition. San Francisco, CA: Jossey-Bass Publishers, 1985.

Kaplin, William A. and Barbara A. Lee. *The Law of Higher Education: 1986-1990 Update*. Washington, DC: National Association of College and University Attorneys, 1991.

Rigney, David B. and Blain B. Butner. *Federal Student Financial Aid Programs*. Washington, DC: National Association of College and University Attorneys, 1993.

Rothstein. "Commentary. Students, Staff and Faculty with Disabilities: Current Issues for Colleges and Universities," *17 Journal of College and University Law 471* (1991).

Strohm, Leslie Chambers, Ed. *AIDS on Campus: A Legal Compendium*. Washington, DC: National Association of College and University Attorneys, 1991.

Van Tol, Joan E., Ed. *College and University Student Records: A Legal Compendium*. Washington, DC: National Association of College and University Attorneys, 1989.

II. FACULTY

A. Discipline, Dismissals and Due Process

Hustoles, Thomas P. "Faculty and Staff Dismissals: Developing Contract and Tort Theories," *10 Journal of College and University Law 479* (1984).

Lovain. "Grounds for Dismissing Tenured Postsecondary Faculty for Cause," *19 Journal of College and University Law 419* (1984).

Luzum and Pupel. "Weinstein v. University of Illinois: The 'Work-for-Hire' Doctrine and Procedural Due Process for Nontenured Faculty," *15 Journal of College and University Law 369* (1989).

Olswang and Lee. "Scientific Misconduct: Institutional Procedures and Due Process Considerations," *11 Journal of College and University Law 51* (1984).

B. Employment

Barnes and Khorey. "The Effects and Use of Administrative Determination in Subsequent Employment Litigation," *16 Journal of College and University Law 189* (1989).

Eames, Patricia and Thomas P. Hustoles, Eds. *Legal Issues in Faculty Employment*. Washington, DC: National Association of College and University Attorneys, 1989.

Frost. "Case Comment. Shifting Meanings of Academic Freedom: An Analysis of University of Pennsylvania v. EEOC," *17 Journal of College and University Law 329* (1991).

Lee, Barbara A. *Peer Review Confidentiality: Is It Still Possible?* Washington, DC: National Association of College and University Attorneys, 1990.

McDonald. "Contract: A Property Right Under the Fourteenth Amendment? Vail v. Board of Education," *11 Journal of College and University Law 445* (1985).

Rothstein. "Commentary. Students, Staff and Faculty with Disabilities: Current Issues for Colleges and Universities," *17 Journal of College and University Law 471* (1991).

III. STUDENTS

A. Discipline, Dismissals and Due Process

Annotation: Expulsion, Dismissal, Suspension, or Other Discipline of Student of Public School, College, or University As Violating Due Process Clause of Federal

Constitution's Fourteenth Amendment—Supreme Court Cases, 88 L.Ed. 2d 1015 (1992).

Annotation: Right of Student to Hearing on Charges Before Suspension or Expulsion from Educational Institution, 58 A.L.R. 903 (1993).

Bracewell, William. "Student Discipline," in Margaret J. Barr, *Student Services and the Law*, *op. cit.*

Brown, Valerie L. and Katherine Buttolph, Eds. *Student Disciplinary Issues: A Legal Compendium*. Washington, DC: National Association of College and University Attorneys, 1993.

Dannels, Michael. "Changes in Disciplinary Policies and Practices over 10 Years," *3 Journal of College Student Development* (September 1990).

Long, Nicholas T. "Standard of Proof in Student Disciplinary Cases," *12 Journal of College and University Law 71* (1985).

Mawdsley, Ralph D. "Plagiarism Problems in Higher Education," *13 Journal of College and University Law 65* (1986).

Milam, Steven D. and Rebecca D. Marshall. "Impact of the Regents of the University of Michigan v. Ewing on Academic Dismissals from Graduate and Professional Schools," *13 Journal of College and University Law 335* (1987).

Pavela, Gary. *The Dismissal of Students with Mental Disorders*. Washington, DC: National Association of College and University Attorneys, 1990.

Picozzi, James M. "Note: University Disciplinary Process: What's Fair, What's Due, and What You Don't Get," *96 Yale Law Journal 2132* (1987).

Rhode, Shari R. and Melissa G. Math. "Student Conduct, Discipline, and Control: Understanding Institutional Options and Limits," in Margaret J. Barr, *Student Services and the Law*, *op. cit.*

Richmond, Douglas R. "Students' Rights to Counsel in University Disciplinary Proceedings, *15 Journal of College and University Law 289* (1989).

Sweitzer, Thomas A. "'Academic Challenge' Cases: Should Judicial Review Extend to Academic Evaluations of Students?" *41 American University Law Review 267* (1992).

Stearns, Laurie. "Comment: Copy Wrong: Plagiarism, Process, Property, and the Law," *80 California Law Review 513* (1992).

Steele, Brenton H., et al. "Managing the Judicial Function in Student Affairs," *25 Journal of College Student Personnel* (July 1984).

Stoner, Edward N. and Kathy L. Cerminara. "Harnessing the 'Spirit of Insubordination': A Model Student Disciplinary Code," *17 Journal of College and University Law 89* (1990).

Sullivan. "The College or University Power to Withhold Diplomas," *15 Journal of College and University Law 321* (1989).

Swem, Lisa L. "Due Process Rights in Student Disciplinary Matters," *14 Journal of College and University Law 359* (1987).

B. Discrimination

Hustoles, Thomas P. and Walter B. Connolly, Jr., Eds. *Regulating Racial Harassment on Campus*. Washington, DC: National Association of College and University Attorneys, 1990.

Kaufman, Hattie E. *Access to Institutions of Higher Education for Students With Disabilities*. Washington, DC: National Association of College and University Attorneys, 1991.

Rothstein. "Commentary. Students, Staff and Faculty with Disabilities: Current Issues for Colleges and Universities," *17 Journal of College and University Law 471* (1991).

IV. SEXUAL HARASSMENT

Cole, Elsa Kircher. "Recent Developments in Sexual Harassment, *13 Journal of College and University Law 267* (1986).

Cole, Elsa Kircher, Ed. *Sexual Harassment on Campus: A Legal Compendium*. Second Edition. Washington, DC: National Association of College and University Attorneys, 1990.

Keller. "Consensual Amorous Relationships Between Faculty and Students: The Constitutional Right to Privacy," *15 Journal of College and University Law 21* (1988).

V. MISCONDUCT

AAA-AAB National Conference of Lawyers and Scientists. *Project on Scientific Fraud and Misconduct: Report on Workshop Number Three*. Washington, D.C.: American Association for the Advancement of Science, 1989.

American Association of University Professor. *Statement on Plagiarism*. Washington, D.C.: AAUP, 1989.

Beyond the Framework: Institutional Consideration in Managing Allegations of Misconduct in Research. Washington, D.C.: Executive Council, Association of American Medical Colleges, September 24, 1992.

Framework for Institutional Policies and Procedures to Deal with Fraud in Research. Washington, D.C.: Association of American Universities, November 10, 1989.

Hallum, Jules and Suzanne Hadley, "Editorial: Rights to Due Process in Instances of Possible Scientific Misconduct," *Endocrinology*, Vol 128, No. 2, 1991, 643.

Michaelson, Martin, "Observations on the Handling of Research Misconduct Cases," *The NACUA College Law Digest and West's Eduction Law Report*, December 5, 1991, 114.

Mishkin, Barbara, "Responding to Scientific Misconduct: Due Process and Prevention;" Commentaries by Paul J. Friedman, "Research Ethics, Due Process, and Common Sense," and Patricia K. Woolf, "Science Needs Vigilance Not Vigilantes," *JAMA*, Vol. 260, No. 13, October 7, 1988, 1932–40.

National Academy of Sciences, National Academy of Engineering, and Institute of Medicine. *Responsible Science: Ensuring the Integrity of the Research Process*, Vol. 2. Washington, D.C.: National Academy Press, 1993.

Teich, Albert H. and Mark S. Frankel, Good Science and Responsible Scientists: Meeting the Challenge of Fraud and Misconduct in Science. Washington, D.C.: AAAS-ABA National Conference of Lawyers and Scientists, March 1, 1992.

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